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Supreme Court, U.S.
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No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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October Term, 1985

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**MARION NAMENWIRTH**

Petitioner

vs.

**BOARD OF REGENTS OF THE**
**UNIVERSITY OF WISCONSIN SYSTEM**

Respondent

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# APPENDIX B TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October, 1985

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APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

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**MARION NAMENWIRTH.** *

Plaintiff, *

vs. *

**BOARD OF REGENTS** *
**OF THE UNIVERSITY**
**OF WISCONSIN SYSTEM,** *

Defendants. *

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**DECISION AND ORDER**
**FOR JUDGMENT**
**CASE NO. 80-C-340-G**

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This is an action for equitable relief -- including job reinstatement and back pay -- brought by the plaintiff to redress the alleged deprivation of rights secured to her by Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, et seq. Plaintiff has claimed that she was discrimated against on the basis of her sex when the defendant refused to promote her from the rank of assistant professor to the

tenured rank of associate professor. Jurisdiction is present. 42 U.S.C. §2000e-5(F); 28 U.S.C. §1343(4). The case is before me as magistrate upon the consent of the parties pursuant to 28 U.S.C. §636(c)(1).

A lengthy court trial having been conducted and the parties having submitted voluminous post-trial arguments, the case is now ready for decision.

**FINDINGS OF FACT**

The following findings of fact are numbered consecutively. They include findings that I have formed and phrased on my own initiative, as well as those findings that I have accepted from among those proposed by the parties. Some of the parties' proposed findings have been accepted in the precise form drafted by counsel. Others have been modified, either on my own initiative or as a result of my consideration of objections raised by the

opposing party. A great many others have simply been rejected.[1]

In any event, the findings that follow constitute my findings of material fact,

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1. The following remarks are not made gratuitously, but as (1) an intended gentle criticism of counsel, and (2) an explanation of why the total number of findings in this decision is considerably smaller than the number proposed by counsel.

Given the conscientiousness and thoroughness of counsel, and given the complexity of the factual information they have had to master to prepare for and present this case, it is not surprising that their proposed facts (and their objections to their counterpart's proposed facts) are as numerous and as lengthy as they are. But in all complex matters there is a tendency to lose the forest for the trees. The adversarial system sometimes magnifies that tendency, as I think it did in this case. Counsel have presented the court with proposed facts and objections far greater in number than those necessary to discharge their respective burdens of proving certain material objective facts. Moreover, the character of their proposed facts was often not helpful, sometimes because the proposals were mere summaries of testimony and sometimes because they were too argumentative in form.

It is for these reasons that I have rejected many of counsel's proposed facts as not genuinely material or relevant, and have significantly modified others.

made pursuant to Rule 52(a), FED.R.CIV.P., on the basis of the entire record in this case. In making these findings and in declining to make others, I have required the plaintiff to prove by a preponderance of the evidence those factual propositions necessary to entitle her to the relief sought, and I have required the defendant to prove by a preponderance of the evidence those factual propositions necessary to its defense.

1. When this action was commenced plaintiff Marion Namenwirth was a resident of Madison, Wisconsin. She is a woman.

2. Defendant, the Board of Regents of the University of Wisconsin System, (hereinafter referred to as "the Board") is a body corporate created by the statute and governed by Chapter 36, WIS. STATS. The Board governs the public system of higher education in Wisconsin called the University of Wisconsin System. The Board is an

employer as defined in 42 U.S.C. Section 2000e(b), as amended.

3. A major campus of the University of Wisconsin System is the University of Wisconsin-Madison.

4. At all times relevant to this case there existed at the University of Wisconsin-Madison a Department of Zoology, (hereinafter referred to as "the Department"); a Biological Sciences Divisional Executive Committee (hereinafter referred to as "the Divisional Committee"), whose membership changes by one-third each year; the Dean of the College of Letters & Sciences, E. David Cronon; the University Committee, which is a committee elected by the University faculty to govern the faculty; and the Chancellor. All of the individuals or the committees named, and others named or described above, who were involved in employment decisions relating to Namenwirth, including her tenure review,

were employees of the Board defined by Title VII.

5. At all times throughout Namenwirth's tenure proceedings, the Chancellor of the University of Wisconsin-Madison was Irving Shain.

6. Appointments are made to the faculty at UW-Madison by the Board at the assistant professor level after affirmation recommendation of the Department to the Dean, after the approval by the Dean, and approval of the Chancellor.

7. At UW-Madison an assistant professor in Zoology is promoted to tenure with the rank of associate professor by action of the Board only after the Department of Zoology recommends tenure to the Dean, after the Dean seeks the advice of the Divisional Committee on the teaching, research and service of the candidate, and after the Dean makes a favorable recommendation to the Chancellor. An

assistant professor is considered for promotion to tenure not later than the sixth year in rank as an assistant professor.

8. Namenwirth received a B.A. degree from the University of Minnesota in 1961, and a Ph.D. degree in Zoology from Indiana University, Bloomington, Indiana, in 1969. She spent two years (1969-71) doing postdoctoral work in biochemistry at the University of Washington, Seattle, Washington. She applied for and was hired as an assistant professor in the Department of Zoology at UW-Madison, beginning September, 1971. Her educational background, publications and teaching experience as of 1971 were stated on her curriculum vitae submitted to the Department upon her application for the position.

9. Plaintiff was notified of the Department decision to give her a three-year appointment (three academic years) and the terms of the appointment by a letter from

the then-Department Chairman, Professor William C. Burns, dated March 26, 1971. The appointment letter advised Namenwirth, in part:

> Reappointment beyond the period of three years depends upon an evaluation made in due course by the departmental Executive Committee.
>
> The department expects that you will develop a new course in introductory general biology that would be offered at least one semester each year. In addition to your teaching elementary biology, we wish that you will offer a course more specifically related to your own special field in developmental biology. This may be designed in concert with others or taught solely by yourself. We further expect that you will participate in graduate student seminars in your reseach field.

10. As of September, 1971, Namenwirth was the only female assistant professor in

the Department of Zoology, a multi-disciplinary department which exists within the College of Letters & Science at the University of Wisconsin-Madison, and is part of the Biological Sciences Division for tenure review purposes. As of that time, she was the only woman ever hired by the Zoology Department after a national search, who had a Ph.D. granted by an institution other than the University of Wisconsin-Madison. As of that time, the Zoology faculty consisted of 23 males.

11. The members of the Department of Zoology worked in disparate geographic locations on the University of Wisconsin-Madison campus, but primarily in the Zoology Research Building located on Johnson Street between Charter and Mills, in Birge Hall on Bascom Hill in the main part of the campus, in the Molecular Biology lab on the Agricultural campus, and in the Limnology Building on the shore of Lake Mendota. The

subspecialties in the Department are Developmental Biology, Animal Behavior, Limnology, Molecular Biology, Cell Biology, Ecology, Genetics, Neurophysiology and Endocrinology. The faculty, tenured and non-tenured, met on a weekly basis at Noland Hall, which is adjacent to Zoology Research and connected to it by a basement hallway. For many members of the Zoology Department, the weekly faculty meetings were their only contact with their colleagues from other locations. Noland Hall is also the site where the bulk of the Zoology courses are taught. Courses are taught by faculty members, sometimes with the help of lab preparators and teaching assistants. Teaching assistants are graduate students from all subspecialties. Their major professors might be located in any of the geographic locations of the Department, but the TA s would have frequent contact with one another at Noland Hall.

12. Namenwirth worked at the Zoology Research Building along with numerous other scientists, including Professors Robert Auerbach, David Sonneborn, Jack Lilien, Hans Ris, Anthony O.W. Stretton, Seymour Abrahamson, Walter Plaut and Warren Porter. Her office and lab were in the basement of the Zoology Research Building (20 Research), space vacated by a departing professor in the summer of 1971.

13. Namenwirth is a developmental biologist, which is a "laboratory" science discipline. A difference in the disciplines in the Zoology Department exists between laboratory researchers and field researchers. Developmental biologists are laboratory researchers. Ecologists are generally field researchers.

14. Professors Sonneborn, Auerbach and Lilien are also developmental biologists with offices and labs in Zoology Research on the first, second and third floors

respectively. Professors Plaut and Ris are cell biologists. They are located on the third floor. Professor Abrahamson is a geneticist. His office and lab are located on the second floor. Professor Stratton is a neurophysiologist. His office and lab are located on the first floor. Professor Porter is an ecologist. His office and lab are located on the second floor.

15. The interactions between faculty in the Zoology Department were generally informal, conditioned by physical proximity; that is, floor and location. There was also interaction between people in the various laboratories.

16. Namenwirth's opportunity for such informal interactions with other faculty members was reduced by her office and lab location in the basement of Zoology Research. Her relations with her colleagues were cordial, however.

17. At the time of her appointment, Namenwirth was the only female member of Zoology Department faculty who was on tenure track; meaning that at or before the end of her sixth year, she was to be evaluated and considered for tenure. All the male professors in the Department had similarly been hired on tenure track.

18. The standards for tenure in the Department of Zoology did not change between 1968, when Professor Sonneborn was tenured, and 1979, when Dr. Moermond was considered for tenure. The application of those standards became more exacting, however, beginning in the mid-1970's, as available funds and positions began to shrink.

19. The primary expressed standard for all those considered for tenure at the UW-Madison during those years was: excellence in either teaching or research, and adequacy in the other as well as in service. At the UW-Madison research was emphasized over

teaching and service in the application of this standard. Because of this emphasis, the primary tenure consideration throughout the period of Namenwirth's tenure review was the tenure candidate's research potential, as demonstrated by the candidate's scholarly publications, and the presence or absence of grant support for research.

20. The tenure standard embodies a subjective element. Reasonable persons engaged conscientiously in an effort to apply the standard to a particular tenure candidate, such as Namenwirth, could reasonably differ in their conclusions. Any one person conscientiously engaged in an effort to apply the standard to different tenure candidates over a period of time could reasonably apply the standard somewhat unevenly among the candidates.

21. Every tenure track faculty member is considered to be eligible for tenure at the end of the fourth, and no later than the

end of the sixth year in rank as an assistant professor. A beginning assistant professor is normally appointed for an initial three-year term. A review after the third year determines whether the assistant professor may continue. Thereafter, he or she is reviewed annually for possible reappointment for an additional year, nonretention, or possible promotion to associate professor. After her third year, Namenwirth was evaluated and her contract renewed, upon the unanimous recommendation of the Zoology Department. Namenwirth's appointment was subsequently extended for a fifth and sixth year, on both occasions by unanimous recommendation of the Zoology Department.

22. Annual reviews of faculty for contract renewal and ultimately for tenure are made by a Salary and Promotion Committee of the Zoology Faculty.

23. The tenure process at the time relevant to his case generally operated as follows:

The Zoology Department Salary and Promotion Committee, after reviewing a tenure candidate's qualifications, decides whether or not to recommend tenure to the tenured department faculty, the Faculty Executive Committee.

The tenure recommendation is considered at a faculty meeting. The presenter of the Salary and Promotion Committee tenure recommendation is closely questioned.

The tenured faculty then votes. If the vote is favorable, the Department chairman, along with the person or persons most familiar with the candidate's record prepares a document addressed to the Dean and the Executive Committee of the Biological Sciences Division (the Divisional Committee). This document is intended to advance the Department's

recommendation for the grant of tenure, but it is also intended to contain a complete and balanced analysis of the candidate's performance. If there was significant minority opposition within a department to a candidate's tenure, a tenure document that did not describe and discuss this opposition would be considered incomplete.

The Divisional Committee may support or override the department's recommendation. If an initial recommendation is not accepted by the Divisional Committee, it can be reconsidered at the request of the department. A telephone call is made to the department chairman to inform him of a rejection before the formal decision is transmitted. This gives the department time to request reconsideration.

The Divisional Committee forwards a final recommendation to the Dean of the College of Letters & Science who either forwards a favorable recommendation to the Chancellor

or informs the candidate of non-renewal of contract.

24. In May of 1975, when Namenwirth's contract was extended an additional year, she asked that the Salary and Promotion Committee not consider her for tenure that year (her fourth).

25. On October 13, 1975, Namenwirth was asked to submit materials or documentation for the Salary and Promotion Committee to use in the review of her activities for deciding whether she should be promoted to the Associated Professor rank with tenure. She submitted a bibliography of current publications and manuscripts in preparation and a narrative description of research projects in progress.

26. In January of 1976, the Salary and Promotion Committee extended Namenwirth's contract for an additional year and stated that:

Dr. Namenwirth was seriously considered for promotion this year by our Salary and Promotions Committee. We have sufficient information, which was, overall favorable, to evaluate her teaching and service activities, but insufficient data to make an evaluation of her research contributions. New manuscripts listed have only recently been completed and are not yet ready to be evaluated by editorial reviewers or various scientists in the field outside the University. When these reports are available, the Committee will re-examine her qualifications for promotion to tenure and submit its recommendation to the Executive Committee. In the meantime, we feel that a one-year extension of her appointment is entirely appropriate. We recognize that 1976-77 represents her sixth year as an assistant professor and the final decision regarding promotion or non-renewal will need to be made before the end of that year.

27. During the winter of 1976, the Salary & Promotion Committee began its review of Namenwirth's record for possible promotion to tenure. At that time, she was the first woman to have been considered for tenure in thirty-five (35) years by the Zoology Department.

28. There was a concern at that time among the Salary and Promotion Committee members that the number of Namenwirth's publications might be insufficient for her to achieve tenure. Namenwirth was aware of this concern. The Committee's concern was over the number of publications, not their quality.

29. The Salary & Promotion Committee had solicited and received outside review letters on Namenwirth from eight developmental biologists outside the University of Wisconsin-Madison. Some of the outside reviewer names were suggested by Namenwirth, others by Sonneborn. When

it appeared as though Namenwirth's tenure consideration would encounter difficulty, Auerbach suggested to Namenwirth that two additional reviewers be selected: Dr. Briggs, Namenwirth's former major professor, and Dr. Hay, a scientist whose high standards of judgment he greatly appreciated.

30. The Salary and Promotion Committee favored Namenwirth's tenure recommendation, but only by a slight majority. The committee did not recommend tenure. It made no recommendation. Instead, it prepared a report that was of considerable importance in Namenwirth's future tenure considerations. Because the report was considered by department chairman Burns to reasonably represent the range of matters debated by the department in the tenure process, it ultimately became a part of the department's submission to the Divisional Committee. Among other negative and

positive evaluations within it, the report expressed serious concern as to the adequacy of Namenwirth's publication record and the strength of her research program. These concerns were not unreasonable.

31. Following the deliberations of the Salary and Promotion Committee, the Namenwirth tenure case was presented to the tenured faculty of the Zoology Department for its discussion and vote.

32. The Salary and Promotion Committee report was presented to the faculty at a February 1, 1977 meeting, with no recommendation as to tenure. Professor Auerbach presented the report for the Committee. At that meeting, a vote was taken and a recommendation for tenure was defeated on a vote of 10 yes, 11 no, and 1 abstention. This split vote was the result of apparently independent determination by the participating faculty members.

33. Professors Dodson and Moermond had the benefit of an "advocate" during the course of their tenure considerations in 1970 and 1978-79, repectively; i.e., a tenured faculty member who, without any formal appointment or designation, was outspoken in his effort to advance the candidate's tenure chances. No such "advocate" emerged for Namenwirth in the course of her tenure consideration.

34. This does not mean, however, that Namenwirth had no supporters. The close vote on February 1 demonstrates the contrary. Among those voting for Namenwirth were the department's three other developmental biologists, professors Sonneborn, Auerbach and Lilien.

35. A request for reconsideration of the initial Namenwirth tenure vote having been made, the matter was considered again at a faculty meeting on February 8, 1977. Namenwirth spoke on her own behalf at the

meeting. A vote was taken and a reconsideration for tenure was approved on a vote of 12 yes, 10 no, and 1 abstention.

36. At Auerbach's request for reconsideration, a third vote on tenure was taken at a February 22, 1977 faculty meeting. The recommendation for tenure was defeated by a vote of 9 yes, 13 no, and 1 abstention.

37. Namenwirth requested reconsideration of the third vote. At a March 15, 1977 faculty meeting, a fourth vote was taken. Auerbach was not present. He was telephoned by Professor Burns and abstained. The vote was 10-10 with three abstentions. When contacted again, Burns changed his abstention to a positive vote and a recommendation for tenure for Namenwirth was approved by a vote of 11 yes, 10 no and 2 abstentions. This was the final department vote on the matter.

38. Prior to the final vote at the March 15 meeting, a letter from Zoology Professor

Neess was distributed to the faculty at the meeting. In his letter, Neess expressed the opinion that in seeking the view of so many outside reviewers, the tenured faculty was holding Namenwirth to a more severe tenure test than had been applied to previous male tenure candidates.

39. Prior to the 1971 hiring of Namenwirth to a tenure track position, the only other women to hold a tenure-track position in the UW-Madison Zoology Department was Dr. Nellie Bilstad. She received her Ph.D. at the UW-Madison and was first hired into a tenure track instructor position in 1931. She was granted tenure as an Assistant Professor in 1942, and was promoted to Associate Professor rank in 1950. There she remained until 1969, her final year before retirement, when she was at last promoted to full professor.

40. During her faculty career at the UW-Madison, Bilstad received a salary lower

than her male counterparts and appears to have been treated by them in a patronizing and condescending manner. Although her research activities were modest, male department colleagues who were junior to her and who also did little research rose rapidly beyond her in both salary and rank. With regard to her salary level and promotional advancement, it very clearly appears that Bilstad was the victim of purposeful discrimination on the basis of her sex.

41. The discrimination against Dr. Bilstad reflected longstanding and pervasive sex discrimination in higher education at the UW-Madison and elsewhere throughout the nation, prior to March 24, 1972, when Title VII became effective as to institutions of higher education.

42. In 1970, only 150 of 2,000 faculty members at UW-Madison were female. Half of the women faculty were in traditionally female departments: nursing, home economics

and women's physical education. Moreover, the tendency was for such women to be concentrated in the lower academic ranks of instructor and research associate.

43. In 1970, over 50 departments at UW-Madison had no women faculty members at all; yet in the academic disciplines represented by these departments, from 10% to 38% of the Ph.D.'s were being awarded to women.

44. In July, 1970, the Department of Health, Education and Welfare, responding to a complaint from the Women's Equity Action League, began investigating alleged sex discrimination at the Univeristy of Wisconsin. HEW concluded that there was a pattern of discrimination against, and under-utilization of, women at UW-Madison.

45. Responding to pressure from HEW, UW-Madison Chancellor Edwin Young directed university departments to initiate a program of remedial hiring for women faculty. An "Affirmative Action Office" was also set up

under the Chancellor's supervision. Its responsibilities were to monitor hiring and promotion statistics at the UW-Madison, as well as to investigate complaints of discrimination.

46. Investigations by H.E.W. and by the University itself revealed unjustifiable salary discrepancies between male and female faculty at the same rank and in the same department, ranging as high as $5,000.00. A total of 424 salary equity adjustments were then made in the early '70's. The so-called "Women's Issues" and "Affirmative Action" became important topics of discussion and activity on the UW campus in the early 1970 s. Professor Arbrahamson of the Zoology Department served as a member of a committee that acted to equalize salary instructions at the UW-Madison.

47. As late as 1978, of 323 tenured faculty in the science departments of the

College of Letters and Science, only 6 were women.

48. Even today, only 19 of 113 UW-Madison departments have women represented on their faculties in proportion to their percentage availability in the profession. Twenty-seven departments still have hired no women.

49. Because of the inherent subjective component of tenure evaluations, and because of the predominence of males in tenured faculty ranks, and because of the prior history of active sex discrimination in higher education, and because of the present continuing under-representation of women in tenured faculty ranks, there is a real but unquantifiable danger that sex bias will enter into any tenure consideration process.

50. Following the final March 15, 1977 vote of the zoology faculty to recommend tenure for Namenwirth, department chairman Burns prepared a tenure submission (or

packet or dossier) which was forwarded to the Executive Committee of the Biological Sciences Division. The tenure packet included evaluations of Namenwirth's performance in the three critical areas of teaching, research and service. Although she was rated well in teaching and service, the research evaluation stated that "her research accomplishments and potential" were a "major source of concern." In expressing the two divergent schools of thought within the department on her research -- (one) that while her published work was sound, her publication record was inadequate and her potential for future high-quality research was questionable, and (2) that her publication record was acceptable and that her potential for future work ought be rated excellent on the basis of the excellent quality of her already completed work -- the packet fairly characterized the ambivalence of the Zoology Department's

tenured faculty on her tenure recommendation. The packet also openly conceded that no other tenure candidate "in recent years has had his credentials and activities so thoroughly examined as Dr. Namenwirth."

51. The packet sent to the Divisional Committee from the Zoology Department in March of 1977 was assembled through a process in which Namenwirth had a full and fair opportunity -- and a genuine personal incentive -- to participate, contribute, and comment. Indeed, the packet included material provided by and written by Namenwirth, including a statement on planned improvements in her teaching duties and an outline of her current research ideas and accomplishments. Namenwirth had considerable opportunity to correct any errors, omissions, or misinterpretations that she believed to be contained in the packet.

52. The Namenwirth tenure packet also included a frank description of the intense departmental debate over Namenwirth's tenure, the repeated voting, and the close nature of the tenure recommendation vote. Anything less would have been disingenous.

53. Namenwirth's case came up for discussion briefly near the end of the April 1, 1977 meeting of the Biology Division Executive Committee, but was held over to the next meeting. As Professor Norma Kolthoff left the meeting as part of a group of Divisional Committee members who were walking in a group to the west part of the campus, she overheard another but unidentified committee member remark: "But Nellie was such a lady." She knew that Nellie Bilstad had been the only women ever to hold a tenured faculty appointment in Zoology. The context of this remark is unclear. There was never any comparison of Bilstad with Namenwirth during the course

of the Divisional Committee proceedings in Namenwirth's case. I can attach no significance and can ascribe no meaning to this isolated comment.

54. On April 22, 1977 the Divisional Committee considered Namenwirth's tenure and voted to recommend rejection of the Zoology Department's recommendation for tenure by a vote of 10 to 2. Zoology Department Chairman Burne was informally notified of the committee's vote within a very few days but was unable to obtain an official written decision until May 27, 1977. On that date he received a copy of the committee's letter to Dean Cronon, dated May 26, 1977, and he forwarded it immediately to Namenwirth. The committee's letter, written by Chairperson Dorothy J. Pringle, contained the following explanation for its disapproval of Namenwirth's promotion to a tenured rank:

> [T]he positive vote of the Executive Committee of the Department of Zoology by the narrowest of margins seems to indicate that the Department is not sure that this is the best candidate for the position.
>
> In revising the record, the Executive Committee felt that Professor Namenwirth's teaching and service performance were satisfactory. The research record, however, seems to represent a last minute effort to get sufficient evidence for tenure rather than represent an independent effort to develop a research program that is original and of high quality and significance. Professor Namenwirth's satisfactory teaching and service performance does not outweigh the weak research performance.

55. In advising Namenwirth on May 27, 1977 of the Divisional Committee's final decision, Burns also advised that he had been informed by Dean Cronon that the dean

was accepting the committee's decision and would not recommend Namenwirth's promotion and tenure.

56. In a May 31, 1977 letter to Dean Cronon, Namenwirth requested a reconsideration of the decision to deny tenure. She also complained to the Department that the Divisional Committee's reasons for disapproving tenure contained false statements about her work.

57. There followed from May 31, 1977 until April 7, 1978, correspondence and meetings between the Dean, Namenwirth, the Department and Divisional Committee regarding several matters, including the possibility of the Divisional Committee either clarifying the reasons for the previous Divisional Committee's decision as set forth in the letter of May 26, 1977, or reconsidering Namenwirth's case for the purpose of attempting to make a new decision.

58. The department discussed the matter at several meetings and protested formally to the Division by letter on October 12, 1977. The department did not believe that reconsideration of tenure was appropriate; instead, its objection was to be reasons set forth in the Pringle letter. The department was satisfied with the outcome of the tenure decision; it simply wanted a better statement of reasons.

59. The Divisional Committee wanted to reconsider the Namenwirth case, but then insisted they would do this only after the Department had reconsidered the case itself, taken another vote, and forwarded an updated set of written materials. The Zoology Department refused to do this. They urged the Divisional Committee to produce, instead, an acceptable set of reasons for the original decision to recommend against tenure. The Divisional Committee was unwilling to do this.

60. Namenwirth was notified in early April of 1978 that there would be no reconsideration of her tenure denial.

61. Namenwirth appealed to the University Committee in the summer of 1978. The University Committee recommended that the Divisional Committee reconsider the Namenwirth case, using only the documents originally submitted by the Zoology Department. They recommended also that Namenwirth be retained on the faculty one more year, and that the Divisional Committee consider, in addition to the department's written materials, additional material that Namenwirth was invited to submit.

62. The Namenwirth case was accordingly reconsidered by the Biological Division Executive Committee on October 20, 1978. Her case was assigned to committee members Dr. Richard Hanson, as the primary presentor, and Dr. Norma Kolthoff, as the secondary presentor.

63. The Department of Zoology duplicated a new set of copies of their original submission and distributed this to the Divisional Committee. However, they added to the submission an Appendix VII, containing several letter written by Namenwirth shortly after she had been denied tenure, and had seen for the first time the written materials the department had submitted describing her work. In these letters Dr. Namenwirth raised the issue of possible sex bias.

64. Dr. Hanson made as careful a presentation as possible about Namenwirth's record, relying on the Department's submission, but attempting to exclude those parts of the submission which he considered unfair, and relying as well on the extensive materials submitted by Namenwirth.

65. In the course of his presentation to the committee, Hanson reported that Namenwirth had three grant applications

turned down. They were a 1972 applicat .. to the National Institute of Health, a 1974 application ot the Muscular Dystrophy Foundation. and a 1975 application to the National Institute of Health. This information was somewhat misleading. The 1972 application had already been funded by the National Science Foundation. The 1974 application to the Muscular Dystrophy Foundation was in fact rejected. The grant proposal listed as being turned down by the National Institute of Health in 1975, was in fact, never submitted to that agency. Dealing with research on regional localization of macromolecules, it was partially written by Namenwirth, then withheld pending her publication of an article on her original regional localization research. Auerbach had advised Namenwirth, and she agreed, that a second grant proposal would not have a reasonable chance of being funded unless the research

done on the previous grant had been published.

66. Dr. Hanson properly considered the presence of grant support to be essential to a scientist's future research, and the absence of grant support to be a serious impediment to such future research. The information Hanson had received about Namenwirth's grant support left him with the impression that she did not have funding to continue her present research. Although that information was somewhat misleading, it was the case that Namenwirth had no significant grant support for her continuing research from agencies outside the University.

67. Dr. Hanson made a lengthy, complete and positive presentation to the Divisional Committee on October 20, 1978. Thereafter, the committee voted. The vote was 7 to 2 against granting tenure to Namenwirth. Dr. Hanson voted with the majority, but

personally considered Namenwirth's record to be a close call.

68. The committee's decision was reported to Namenwirth in a letter dated October 24, 1978. The letter stated:

> The Executive Committee of the Faculty Division of the Biological Sciences met on Friday, October 20, 1978, to consider, among other business, a directive from the University Committee to review the Zoology Department's request for your promotion to associate professor with tenure. The same packet of material sent to the Executive Committee in 1977, along with additional documents prepared by you, were the basis of the evaluation. The review procedure was identical with that used for all candidates in 1977. A very thorough assessment was made and all aspects of the record were discussed. As required by our rules, Dr. William Burns, former chairman of the Zoology Department and presently a member of the Committee, did not

participate or vote, he was, however, available for questioning by the Committee.

This Committee is responsible for peer evaluation and its deliberations are not taken lightly. We seek for the welfare of this university outstanding faculty in a family of academic disciplines. Our criteria for promotion to tenure rank require that a candidate must demonstrate excellence in teaching or research, and show satisfactory performance in the second area and in service. Your record had some laudatory aspects, but the Committee did not regard any area as demonstrating excellence. The motion to recommend promotion to tenure failed to pass by a vote of 2 yes, 7 no, 1 technical abstention. (Two members of the Committee were absent.) Promotion is therefore not recommend.

69. Dean Cronon accepted the Divisional Committee decision and once again decided not to recommend her tenure. In

February of 1979, at Namenwirth's request, he provided her the following reasons for his decision:

(1) The narrow majority of the Zoology Executive Committee recommending you for tenure after initially voting against tenure by an equally narrow majority.

I have serious doubts about the wisdom of granting tenure unless a substantial majority of the executive committee recommends it. Unlike the Zoology Department, a number of our departments require a two-thirds majority to recommend tenure, a provision I favor and recommend to all L & S departments.

(2) The negative reviews by the Biological Sciences Divisional Committee, which twice recommended against your tenure by a large margin.

As you know, the four Divisional Committees are the general faculty's major quality control mechanism for faculty appointments to tenure. Each Committee operates across the entire

University in its specialized area. A Dean must consult the appropriate Divisional Committee on the qualifications of all candidates for tenure. Because the Divisional Committee reflects the opinions of scholars outside the Department but from fields closely related to it, and because it is a disinterested body concerned with the overall quality of the faculty of the University, a Dean must consider its advice on tenure cases very seriously.

(3) My concern about the serious current budgetary problems of the College and the likelihood of further budgetary difficulties if our enrollment should level or decline in the next few years, as seems quite possible.

We presently face the need to reduce our staffing in some areas of the College. Under the circumstances, I believe it is especially important that we grant tenure only to those faculty members whose

> qualifications are beyond question and whose sevice is likely to be needed regardless of any enrollment fluctuations we can foresee at this time.

70. Later in that academic year, the same Divisional Committee received a unanimous recommendation for tenure from the Zoology Department on behal. of Dr. Timothy Moermond, an ecologist.

71. The Divisional Committee, on the basis of Moermond's record which they found to be weak, voted to deny him tenure. Three Zoology faculty members appeared before the committee, however, to protest the tenure denial, to present additional positive evidence on Moermond's case, and to argue his merits.

72. The Zoology Department had the opportunity to similarly contest the Divisional Committee's tenure denial of Namenwirth in May of 1977, but chose not to do so. The department had no additional

material to present in support of Namenwirth's tenure consideration.

73. Appearances by faculty members before the Divisional Committee that merely involved the rearguing of information already supplied about a rejected colleague were not likely to have any effect upon the committee. Effective presentations were those that urged the committee's consideration of new relevant information.

74. The presentation of the three Zoology Department professors in Moermond's case -- a presentation that included information that a previously submitted grant had been funded -- swayed enough votes to result in a Divisional Committee decision to recommend tenure for Moermond.

75. Moermond was shortly thereafter promoted to a tenured rank in the Zoology Department.

76. On July 25, 1979, Professor Namenwirth filed a complaint with the

Milwaukee office of the Federal Contract Compliance Division of the United States Department of Labor, alleging sex discrimination by the UW-Madison.

77. After conducting its investigation, the Department of Labor concluded on October 7, 1980 that the denial of tenure for Namenwirth was the result of a weak tenure recommendation from the Zoology Department, and that she was given a weak recommendation because of her sex.

78. The tenured faculty members of the Zoology Department concluded -- albeit by a narrow margin after considerable debate and equivocation -- that Namenwirth was qualified for tenure. This conclusion was reasonable. Thus, Namenwirth, a female, was reasonably qualified for a tenured position in the UW-Madison Zoology Department. Namenwirth was subsequently denied tenure by the action of the Biological Sciences Divisional Committee and Dean David Cronon.

79. A male, Timothy Moermond, was thereafter promoted to the tenured rank Namenwirth had sought.

80. The defendant Board articulated by evidence at trial the reason for: (a) the Zoology Department's ambivalent and narrow recommendation of tenure for Namenwirth; (b) the Divisional Committee s rejections of the tenure recommendation; and (c) Dean Cronon's decision to deny tenure to Namenwirth. The articulated reason is a reason unrelated to the fact that Namenwirth is a woman. That reason is that, particularly in the area of research output and potential, Namenwirth failed to meet the standard for promotion to tenure at the UW-Madison.

81. In the course of Namenwirth's tenure consideration, a sizable minority of the Zoology Department tenured faculty in fact decided that Namenwirth did not meet the standard for tenure at the UW Madison, principally because of the deficiencies they

perceived in her research output and potential. This was a reasonable decision, and the articulated reason for the decision is not a pretext. If all other factors had been the same, but Namenwirth had been a man and not a woman, the decision of the sizable minority of the Zoology Department would have been the same: to oppose Namenwirth's tenure.

82. In April of 1977 and again in October of 1978, the Divisional Committee in fact decided that Namenwirth did not meet the standard for tenure at the UW-Madison, particularly in the area of research. This was a reasonable decision, and the articulated reason for the decision was not a pretext. If all other factors had been the same, but Namenwirth had been a man and not a woman, the decision of the Divisional Committee would have been the same: to reject Namenwirth's tenure.

83. In May of 1977 and again in February of 1979, Dean David Cronon in fact decided that Namenwirth did not meet the standard for tenure at UW-Madison, particularly in the area of research. This was a reasonable decision, and the articulated reason for it as not a pretext. If all other factors had been the same, and if Namenwirth had been a man and not a woman, the decision of Dean Cronon would habe been the same: to deny tenure to Namenwirth.

## CONCLUSIONS OF LAW

The conclusions that follow constitute my conclusion of law, made pursuant to Rule 52(a), FED.R.CIV.P., on the basis of the facts that I have found above.

1. All jurisdictional requirements for commencement and maintenance of this action were properly and timely met.

2. Defendant Board is an employer as defined in 42 U.S.C. §2000e(b), as amended.

3. Plaintiff Namenwirth tried and argued this case on a theory of disparate treatment; i.e., her claim was that she was treated less favorably in the academic promotion process than others because of her sex. Thus the legal burdens in this case were as follows:

-- plaintiff had the burden of proving a prima facie case of illegal discrimination by a preponderance of the evidence;

-- upon demonstration of a prima facie case, the burden of production shifted to defendant Board to articulate a legitimate, non-discriminatory reason for the denial of tenure to plaintiff;

-- upon articulation of such a reason, the plaintiff, in order to successfully discharge her ultimate burden of persuasion on the issue of discrimination, must prove by a preponderance of the evidence that the defendant's articulated reason was a mere pretext

making a genuine discriminatory motive.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979).

4. In order to establish a prima facie case of discrimination, Namenwirth was required to demonstrate that: 1) she is a member of a Title VII protected class; 2) she was qualified for the tenured position she sought; 3) she was denied promotion to the tenured position; and 4) a male of similar qualifications was granted promotion to this position. Smith v. University of North Carolina, 632 F.2d 316 (4th Cir.) 1980). Namenwirth successfully discharged her burden of proving each of these elements. The first, third and fourth elements were not disputed and were obviously proven. The second element, her

qualification for a tenured position in the UW-Madison Zoology Department was amply demonstrated by convincing evidence that she had the basic skills necessary for the job. That much at least was established by her reappointment after her first, third, fourth and fifth years of teaching and by the departmental faculty's ultimate majority vote in favor of her tenure. Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974); Davis v. Weidner, supra.

5. The burden of production having shifted to defendant Board, the Board clearly articulated a legitimate, non-discriminatory reason for the denial of Namenwirth's tenure; i.e., that while she was qualified for tenure in the sense that she possessed the minimum qualifications for the job, her research record and research potential were insufficient to satisfy the excellence standard required at UW-Madison for promotion to the tenured ranks.

6. To successfully discharge her ultimate burden of proof on her discrimination claim, the burden returned to Namenwirth, to prove that the Board's articulated reason for the denial of tenure was pretextual. Namenwirth attempted to discharge this burden by introducing evidence of: her differential treatment; her being held to higher standard than her colleagues; procedural deficiencies in her tenure process; a lack of counseling regarding tenure from her male faculty colleagues; a general discriminatory atmosphere at the UW-Madison and within the Zoology Department; a lack of safeguards against sex-bias in the tenure process; past sex-discriminatory practices; and evidence of sexist attitudes possessed by her faculty evaluators. As my findings of fact reflect, I conclude that Namenwirth failed to prove the Board's reason for denying her tenure was pretextual, and that she thus failed to

discharge her ultimate burden of persuasion. I am simply not persuaded that Namenwirth's preferred evidence -- much of which was too insubstantial to support the intended finding -- showed that the tenure decision-makers in her case acted with the purpose of disciminating agaisnt her on the basis of sex.

Instead, I am persuaded that defendant Board's articulated reason for denying tenure was the true and genuine basis for the challenged denial of tenure: a reasonable decision, with which others equipped to render the decision might differ but which I cannot reject as arbitrary, that Namenwirth did not possess the requisite research credentials to satisfy the tenure standard. The subjective nature of that decision-making process required that I examine defendant's evidence with the strictest scrutiny, particularly where the challenged tenure denial occurred in the

case of the only woman to be considered for tenure in 35 years in the UW-Madison Zoology Department. Having conducted that scrutiny, I am persuaded that the denial of tenure in this case was genuinely based upon a commitment to scientific excellence and not upon adherence to illegal sex-based animus.

7. Having concluded that the denial of tenure to plaintiff Namenwirth was not based upon her sex, I further and finally concluded that such denial of tenure did not deprive her of any rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et. seq.

**ORDER**

**IT IS ORDERED** that the judgment be entered in favor of the defendant and against the plaintiff, **DISMISSING** her complaint with prejudice.

Entered this 27th day of October, 1983.

/s/
William L. Gansner
United States
Magistrate